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## LIMITED-ACCESS HIGHWAYS: PUBLIC INTEREST VS. ACCESS RIGHTS OF ABUTTING OWNERS

The past decade has marked a steady growth in the use of limited-access highways<sup>1</sup> as one method of coping with the ever-increasing volume and speed of highway traffic. Injury resulting from restriction or extinguishment of abutting landowners' rights of access to these highways offers a potential source of numerous claims for compensation.<sup>2</sup> The most troublesome situation, and one which has engendered conflict among decided cases, arises when an existing roadway with unrestricted access is converted into a through-traffic, or limited-access, highway.<sup>3</sup> This situation was presented, although not decided, in the recent Supreme Court case of *Martin v. Creasy*.<sup>4</sup> A Pennsylvania statute empowered the state to prohibit unlimited access to a particular highway without payment of compensation to abutting owners who previously had access.<sup>5</sup> Application of the statute to all

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1. As its name indicates, the limited-access highway's primary feature is the restriction of entrances and exits. See Cunningham, *The Limited-Access Highway From A Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 22 (1948), where it is suggested that the minimum requirement of a limited-access highway is legal control over direct access from outside the highway and access between the lanes of traffic going in opposite directions.

2. The legal position of the abutter when a limited-access highway is newly constructed differs from the abutter's position when a previously existing roadway is converted into a limited-access highway. In the former situation, there is no prior right of access and no taking for which the abutter should be compensated. For a Missouri case see *State ex rel. State Highway Comm'n v. Clevenger*, 365 Mo. 970, 291 S.W.2d 57 (1956). This note is limited to problems involved where there has been a conversion of a previously existing road.

3. Some courts state that any taking of access must be compensated. E.g., *Department of Pub. Works & Bldgs. v. Wolf*, 414 Ill. 386, 111 N.E.2d 322 (1953); *In re Appropriation of Easement for Highway Purposes*, 93 Ohio App. 179, 112 N.E.2d 411 (1952). See also *People v. Al. G. Smith Co., Ltd.*, 86 Cal. App. 2d 308, 194 P.2d 750 (1948); *State ex rel. State Highway Comm'n v. James*, 356 Mo. 1161, 205 S.W.2d 534 (1947); *Burnquist v. Cook*, 220 Minn. 48, 19 N.W.2d 394 (1945). Other courts by implication qualify the requirement of compensation to instances where access is totally destroyed or substantially impaired. See, e.g., *Nichols v. Commonwealth*, 331 Mass. 581, 121 N.E.2d 56 (1954) (legislature volunteered compensation); *People v. La Macchia*, 41 Cal. 2d 738, 264 P.2d 15 (1953) (dictum); *Neuweiler v. Kauer*, 62 Ohio L. Abs. 536, 107 N.E.2d 779 (1951) (abuse of Highway Director's discretion in determining public necessity would require compensation); *Stock v. Cox*, 125 Conn. 405, 6 A.2d 346 (1939) (permanent provision for alternate access would negate requirement of compensation) (dictum). One case, *Iowa State Highway Comm'n v. Smith*, 82 N.W.2d 755 (Iowa 1957), allows complete taking under "reasonable" circumstances.

4. 79 Sup. Ct. 1034 (1959).

5. Pa. Stat. Ann. tit. 36, § 2391.8 (Supp. 1957). "For the purpose of construct-

abutting owners meant that some would be denied direct access to the highway though still having indirect access by other public roads, while others would be denied all access and thus be landlocked.<sup>6</sup> The affected landowners sought to enjoin the state from converting the highway without payment of compensation for loss of access. They contended that the enabling statute violated the due process clause of the fourteenth amendment.<sup>7</sup> The district court had enjoined the state, deciding that the right of access was a property right not to be taken or materially interfered with without just compensation.<sup>8</sup> The Supreme Court held that the district court should not have acted until the affected owners had exhausted their remedies in the state courts. It is submitted that the Supreme Court's decision may have been influenced by the sweeping nature of the lower court decree which treated all landowners alike and brought to a halt the state's highway program. Justice Douglas, dissenting in part, pointed out the desirability of deciding the primary issue of the case—whether or not access is a property right which may be taken constitutionally without payment.<sup>9</sup> The majority, on the other hand, may well have reasoned that in this particular case the circumstances of each owner

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ing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads *shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken . . .*" (Emphasis added.) Note that the statute treats intangible property damages as consequential, a view taken by some earlier Pennsylvania decisions. For a discussion of this view, see *Miller v. Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951).

6. 79 Sup. Ct. at 1037.

7. U.S. Const. amend. XIV, § 1. Originally, the federal court stayed its proceedings pending a state court interpretation of the meaning of the statute. The plaintiffs then filed an equitable action in the state court, but their complaint was dismissed, the state court holding that the plaintiffs' right to a hearing before a board of reviewers afforded them an adequate legal remedy. No question was raised regarding a possible conflict with the Pennsylvania constitutional provision that "[no] private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. 1, § 10. For the similar Missouri provision, see Mo. Const. art. 1, § 26. All states except Kansas, New Hampshire, and North Carolina have provisions in their constitutions prohibiting taking private property for public use without payment.

8. *Creasy v. Stevens*, 160 F. Supp. 404 (W.D. Pa. 1958).

9. 79 Sup. Ct. at 1038.

were unique enough that general rule formulation might be inappropriate.<sup>10</sup> By failing to resolve the primary issue, the Court is perhaps following the most wise course in a confused area of the law.

The basic problem presented is one of balancing interests. Whatever rights or privileges the abutting owner may have with respect to unlimited access must be weighted against the public interest in developing safer and more convenient highways at the lowest reasonable cost.<sup>11</sup> To determine the weight which should be accorded to these respective interests in particular cases, the following questions must be faced and answered: (1) Do abutting owners have an absolute right of access where access previously has been unlimited? (2) Is deprivation of access a "taking" which requires compensation under the power of eminent domain, or is it a regulatory measure within the state's police power? These questions comprise the scope of this note's inquiry.

Roads originated as private passages cleared by each landowner for his own use and convenience in marketing, and use was gradually and gratuitously extended to neighboring landowners and the public. There could be no question regarding the access rights of the abutting landowner who had constructed the road. When the private roads were given or sold to governmental units for public use it was unquestionably with the understanding that the access rights of the landowner would continue.<sup>12</sup> But it does not necessarily follow that an owner whose land abuts on roads built by the government or by a private corporation is endowed with rights greater than those held by the general public.<sup>13</sup>

Access as a *property right* of the abutting landowner, superior to any right held by the general public, arose by judicial decision. The origin of the right is attributed to the New York elevated railroad cases.<sup>14</sup> *Story v. New York Elevated R.R.*,<sup>15</sup> the first of these cases, shows the several factors militating in favor of recovery for the abut-

10. See 79 Sup. Ct. at 1037, where it is pointed out that each landowner's case will be considered separately if the state courts decide the issues.

11. "A modern four-lane highway can cost four, eight, sometimes ten times as much per mile to build as the two-lane roads of the twenties; it requires 420 per cent more pavement, 400 per cent more earth excavation, 1,000 per cent more steel and 7,626 cubic yards of sub-base previously not built." Koether, "Highway Engineering," in *American Highways Today* 164 (1957 ed.).

12. For discussion of the origin of the right of access see Cunnynggham, *supra* note 1, at 31.

13. *Id.* at 32.

14. See *Story v. New York Elevated R.R.*, 90 N.Y. 122 (1882); *Lahr v. Metropolitan Elevated Ry.*, 104 N.Y. 268 (1887). Earlier cases occasionally mentioned such a right, however. See, e.g., *Lackland v. North Missouri R.R.*, 31 Mo. 180, 186 (1860) (dictum).

15. 90 N.Y. 122 (1882).

ting owner, which are not present in today's limited-access cases. In *Story*, a private corporation built an elevated railroad in front of the plaintiff's property where previously there had been a street covenanted by the city for public use. The elevated railroad structure considerably obscured the light, and destroyed the privacy of persons living on the second floor and the supporting columns interfered with the plaintiff's access to the street. The court, while speaking of access as a property right, decided the case on a contract theory.<sup>16</sup> The taking, contrary to the covenant, was for a *private* purpose and hence there was said to be no basis for denying compensation.<sup>17</sup> This case has subsequently been used to support the conclusion that payment must always be made, even where the taking is for *public* purposes.<sup>18</sup> As a result, the access right has come to enjoy a peculiarly favored position which the federal district court supported.<sup>19</sup> Prior to the *Martin* case, which involved a statute

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16. Three of the seven judges dissented, indicating the extreme doubt at that time as to the existence of any right of access. There is now, however, a sizeable body of case law indicating that such a right exists. This note does not question its existence, but submits that the right, like any other property right, may be reduced or extinguished without payment of compensation, if there is a sufficiently compelling public necessity.

17. Compare the result of the *Story* case with that of *Lahr v. Metropolitan Elevated Ry.*, 104 N.Y. 268 (1887), which also involved a taking for private purposes. The *Lahr* decision rested on the theory that the streets were held in trust by the city for the use of the public, and is cited to show yet another basis which may be used by courts.

18. See, e.g., *Department of Pub. Works & Bldgs. v. Wolf*, 414 Ill. 386, 111 N.E.2d 322 (1953); *In re Appropriation of Easement for Highway Purposes*, 93 Ohio App. 179, 112 N.E.2d 411 (1952).

19. The cases suggest first, that the access right may not be taken without payment under any circumstances, or second, that circumstances justifying access restrictions have not yet arisen. It is doubtful if the second contention can explain the decisions which seem never to question the absolute right to payment. Highways, by their very nature, appear to come within the public necessity requirement of police power regulation. It might then be argued that public safety is grounds for taking without compensating provided the questioned state action is of the type which undeniably produces the desired result. In other words, it might be contended that limiting access is not so clearly beneficial to the public as to justify a complete taking of property. Constitutional sanction for taking would only be extended where the means to produce the result were relatively unassailable. It is submitted, however, that on numerous occasions, courts have upheld the constitutionality of police power taking which was of doubtful efficacy in reaching the goal intended. Probably the most notable example of upholding an uncompensated taking as a valid exercise of police power, in a situation where the means used is dubious, is found in the prohibition laws. See *Mugler v. Kansas*, 123 U.S. 623 (1887). Another Kansas statute which forbade the sale or keeping of cigarettes for sale was held constitutional in *State v. Nossaman*, 107 Kan. 715, 193 Pac. 347 (1920), writ of error dismissed, 258 U.S. 633 (1922). If uncompensated taking

allowing interference without compensation, judicial determination of the constitutional due process issue was considered unnecessary.<sup>20</sup> If the view of the district court is followed, the legislature will be precluded from determining that the weight of the public interest requires that no payment be made.

Every property right may be partially or entirely extinguished by one of two methods—eminent domain or police power. Eminent domain requires compensation where property is taken for public use.<sup>21</sup> "Property" was originally equated to corporeality and "taking" was thus required to be physical.<sup>22</sup> Under this view, easements could not be property. This position has since been generally rejected.<sup>23</sup> The terms have been expanded to refer to mental concepts of property and taking, so that the term property includes access rights. Police power, on the other hand, is confined to the regulatory taking of property necessary to protect the health, safety or morals of the public and does not require that compensation be paid to the property owner.<sup>24</sup> There is no question that the regulation of traffic,<sup>25</sup> and hence the initial designation of limited access highways, is within the police power. But police power cannot be exercised where

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under statutes such as was sustained in the *Mugler* and *Nossaman* cases is permissible, it seems that inappropriateness of means is not the reason for the position of the courts in the limited access cases.

20. Although it was previously thought unnecessary to determine formally whether or not the access right could constitutionally be taken without payment, numerous earlier cases speak of access as a property right subject to constitutional protection. See, e.g., *Burnquist v. Cook*, 220 Minn. 48, 19 N.W.2d 394 (1945). In no cases prior to *Creasy* was the right to compensation questioned; instead, the problems concerned what was compensable, what the damages were, etc. See *United States v. Welch*, 217 U.S. 333 (1910).

21. *United States v. Klamath Indians*, 304 U.S. 119 (1938); *Jacobs v. United States*, 290 U.S. 13 (1933).

22. See *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101 (Pa. 1843). 1 Nichols, *Eminent Domain* 299 (2d ed. 1917) supports the physical view.

23. Restatement, Property § 507, comment a. See, e.g., *United States v. Welch*, 217 U.S. 333 (1910). The physical concept of property has been condemned because it unfairly excludes benefits necessary to the enjoyment of physical property. It has one virtue, certainty, which is lacking in present eminent domain law. Whether the law can be both certain and fair in all situations is difficult to say. Often it is neither in cases where property is taken, and in such cases the physical concept might yield more satisfactory results. Nevertheless, the mental concept of property is now well established in the law.

24. See, e.g., *Appeal of White*, 287 Pa. 259, 134 Atl. 409 (1926).

25. See, e.g., *Muse v. Mississippi State Highway Comm'n*, 103 So. 2d 839 (1958) (median strip restricted access to northbound travel); *Jones Beach Boulevard Estate v. Moses*, 268 N.Y. 362 (1935) (left turns into and out of property prevented); *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S.W. 51 (1926) (one-way street). In all these cases the partial interference with access was held non-compensable.

injury to the individual outweighs the benefit to the public.<sup>26</sup> At this point, regulation is said to become "taking" which is compensable under eminent domain.

The distinction between valid exercise of police power and that which *overvalues* the interests of the public is a nebulous one. Most courts have either ignored the question or disposed of it by a general statement, such as was done by the district court, that the exercise of the police power has gone "too far," with no explanation of the distinction.<sup>27</sup> The preponderance of authority agrees with the district court that any deprivation of access is compensable,<sup>28</sup> but there is authority denying the right of compensation to landowners who, while deprived of direct access to public thoroughfares, had alternative indirect means of access.<sup>29</sup>

The concept of property may well be described as a "bundle of rights." Since access cannot exist separately from the land to which it is servient, it can most properly be considered as only a portion of that "bundle."<sup>30</sup> It is submitted that the courts which find it difficult to sustain restrictions of access to a public highway under police power fail to recognize the right of access as only a portion

26. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (dissent by Brandeis, J.).

27. See *id.* at 415, in the opinion of Holmes, J. One authority has distinguished between the two as follows: "The police power is the power of government to act in furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, without incurring liability for the resulting injury to private individuals. Eminent domain, on the other hand, is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation." Clarke, *The Limited-Access Highway*, 27 Wash. L. Rev. 111, 119 (1952). Cooley has stated: "The police [power] of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, *Constitutional Limitations* 829 (7th ed. 1903). A more cynical view: "police power . . . is the use of state laws to do things that a majority of the Justices, at any given time, do not strongly disapprove of the state's doing—nothing more, nothing less." Rodell, *Nine Men* 124 (1955). See also *Bellerive Inv. Co. v. Kansas City*, 321 Mo. 969, 13 S.W.2d 628 (1929); *City of Clayton v. Nemours*, 353 Mo. 61, 182 S.W.2d 57 (1944).

28. See note 3 *supra*.

29. *Nichols v. Commonwealth*, 331 Mass. 581, 121 N.E.2d 56 (1954) (by implication); *Stock v. Cox*, 125 Conn. 405, 6 A.2d 346 (1939) (dictum). Cf. *Iowa State Highway Comm'n v. Smith*, 82 N.W.2d 755 (Iowa 1957) (as long as reasonable access remained, loss of other access not compensable).

30. See Hohfeld, *Fundamental Legal Conceptions* 96 (1923) where the author talks of the "complex aggregate of rights" possessed by an owner of property.

of the total concept of property and fail to consider the remaining property rights unaltered by the regulation. These courts equate the single right of access to "property" in its entirety, thus mistaking one right for the "bundle."<sup>31</sup> The effect of this narrow view is a natural inclination to find unreasonable deprivation with a smaller degree of regulation.<sup>32</sup> Conversely, a court considering access rights in relation to the whole of the property rights belonging to the abutting owner might readily find that depriving of direct access where indirect access is retained or supplied does not constitute unreasonable taking.<sup>33</sup>

In either case, whether there is total or partial deprivation of access, certain businesses or property may be reduced in value. But the decline in value does not always outweigh the benefit to the public safety accruing as a result of the restriction. The right of access is generally considered to include, in addition to means of ingress and egress of the owner, reasonable accessibility to his clients, customers and patrons.<sup>34</sup> It does not follow, however, that the owner always has a right to direct access regardless of the public

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31. A more precise, if more confusing, statement is that the right of access is itself a bundle within the larger bundle. See *id.* at 164. For simplicity and contrast, the right of access will be treated as though it were a single right.

32. For example, suppose an abutting owner had 50 separate entrance-ways to the highway. If left turns into and out of all 50 were prohibited, or if passage of anything other than private vehicles were prohibited, the regulation would be sustained as a police power function. However, if one of the 50 entrance-ways were to be completely closed, decisions such as the district court gave indicate that this would not be within the police power, since it had gone "too far." Thus, each of the 50 entrance-ways might be reduced in use by 50% or more, and the owner could not recover. Yet if one single way of access were to be taken, though the over-all reduction would be 2%, payment would be mandatory. Perhaps one of the reasons for reaching such an anomalous result is the avoidance by most courts of defining the term "access." It may be used in at least three ways: (1) to mean a single entrance at a certain point to a certain road; (2) to mean the ability to get onto a certain road, at any and all points; (3) to mean the ability to get onto some public road, although not any particular one. It is submitted that in either situation (1) or (2), there should be no absolute right of access.

33. This approach seems to be the one of the Iowa court. See *Iowa State Highway Comm'n v. Smith*, 82 N.W.2d 755, 759 (Iowa 1957), where the court ruled against construing access to mean a single entrance to a certain road. See situation (1), note 32 *supra*. In the *Smith* case, the court states the rule that whether compensation is required or not is generally a question of fact and not law. The district court rejects such an approach.

34. This is the practical significance of having a right of access. Legally, any business loss resulting from the regulation of access is not compensable. Nor is business loss compensable under any circumstances in an eminent domain proceeding, except to the extent it bears upon the fair market value of the property. The value of the property right taken is determined by application of the "before and after" rule, i.e., the difference in the fair market value of the property before and after the taking. See *McCormick*, Damages 535 (1935).



interest. For example, no payment is made to abutting landowners along a highway that has lost most of its traffic because of a newer and better parallel road,<sup>35</sup> because the potential cost to the public is too great. In such cases it is held that the damages suffered by the abutting owners are not compensable because the right of access has not been destroyed, and the owner cannot claim a right to the traffic formerly using the highway.<sup>36</sup>

The willingness of the courts to compensate persons injured by restriction of access rights is probably a natural consequence of the growing concept of spreading the loss.<sup>37</sup> Judges eager to find an improper exercise of police power so as to impose a duty of compensation give too little consideration to the existing financial burden on, and actual danger to, the public.<sup>38</sup>

No rigid line of demarcation between regulation under police power and taking which requires compensation can justly be applied to all situations. Nevertheless, a specific line can be drawn with regard to a specific situation. It is submitted that the difference between denying *all* access (landlocking the owner) and denying direct access where other access is available, is a significant and workable distinction. Accordingly, state legislature should be permitted to determine that in the latter situation, payment need not be made.<sup>39</sup> This view tempers the harshness of extreme injury from total loss of access, and yet allows for the reduction in the cost of highway and traffic improvement.

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35. The damage resulting in such a situation is said to be *damnum absque injuria*. It is not contended that damage is not sustained, but merely that the line must be drawn somewhere. Thus, in this sense, the law is not concerned with whether or not injury has been caused, but only in how it was caused. For a case where this distinction was crucial, see *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799 (1944).

36. *Ibid.*

37. For a contrary concept, see the "assumption of business risk" philosophy of earlier cases as discussed in the dissent of Justice Holmes in *Muhlker v. N.Y. & Harlem R.R.*, 197 U.S. 544, 572-73 (1904). He states that the practical expectation that access will remain unimpaired should not be given the status of a legal right.

38. If public necessity requires, severe limitations may be imposed on property rights under the police power. No better example of this may be found than in zoning laws. In a leading zoning case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), Justice Sutherland, speaking for the Court, made this statement: "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago . . . probably would have been rejected as arbitrary and oppressive." *Id.* at 387. Certainly in 1882 when the *Story* case was decided, there were few reasons why a man who lived next to a public street should not have been allowed access to it. But today, unlimited access is incompatible with modern super roads and high-speed travel.

39. Therefore, the proper result in the *Creasy* case would have been to uphold the constitutionality of the statute except insofar as it allowed the state to landlock the property without compensating the owner.